



OHIO ETHICS COMMISSION

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Advisory Opinion Number 93-002
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Syllabus by the Commission:

Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from providing training or consultation services in his private capacity, where a similar training and consultation program, that was created and administered by the official or employee in the course of his public service, is offered free of charge by the governmental agency the official or employee continues to serve, regardless of the fact that the official or employee no longer administers the program.

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You have asked if the Ohio Ethics Law and related statutes prohibit you, as a state employee, from participating in certain outside employment activities.

By way of history, you have explained that you have been the manager of Installations, Acquisitions, and Evaluations for the Bureau of Workers' Compensation (Bureau) since May of 1991. From October 1, 1990 to April 5, 1991, you were the superintendent of the Division of Safety and Hygiene at the Bureau. Prior to that, you had been the technical and science advisor to the Division of Safety and Hygiene of the Bureau since 1983. You have explained that, in your position as technical and science advisor, you were involved in the creation and oversight of the ergonomics program for the Division of Safety and Hygiene. You have explained that this program involves surveys of industries who call the Bureau for assistance. You have explained, in conversations with the staff, that the ergonomics program also gives assistance to companies that request assistance. Employers can ask questions about, for example, the ergonomic arrangement of a work place to prevent frequently occurring injuries. Employees of the ergonomics program will go to a work place and make recommendations to the employer. The recommendations made by Bureau employees are not binding on the employer, and the employer is not charged for the Bureau's assistance. Finally, you have explained that your current position with the Bureau does not involve any contact with the Bureau's outside clients, and does not involve contact with the Bureau's ergonomics program.

Your question to the Commission involves private employment opportunities you wish to pursue in addition to your public employment. Specifically, you propose to provide training and consultation to private employers, both within and outside of Ohio, on ergonomics, and occupational safety and health. Several statutes within the Ohio Ethics Law condition private employment by public officials and employees. For example, R.C. 2921.42 (A)(4) prohibits public officials and employees from providing goods and services to the public agency with which they are connected. See also R.C. 2921.42 (A)(1) and (A)(3). R.C. 102.03 (A) prohibits a

present or former public official or employee from representing, during his public service and for one year thereafter, any person before any public agency on a matter in which the official or employee has personally participated as a public official or employee through the exercise of administrative discretion. Section (A) of R.C. 102.04 prohibits a state official or employee from receiving compensation to personally provide any services on matters pending before any state entities, excluding the courts. See also R.C. 102.04 (D). R.C. 102.04 (B) prohibits a state official or employee from selling goods or services to any state entities, excluding the courts, except through competitive bidding. *id.* Also, R.C. 2921.43 (A) prohibits a public servant from receiving any compensation other than as allowed by law for performing his public duties.

Most directly on point to your question are Divisions (D) and (E) of Section 102.03 of the Revised Code, which read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

An employee of a state department or bureau is a "public official or employee," for purposes of R.C. 102.03 (D) and (E). See R.C. 102.01 (B) and (C). See also Ohio Ethics Commission Advisory Opinions No. 89-006 and 90-002. Consequently, you are, as an employee of the Bureau of Workers' Compensation, a "public official or employee" who is subject to the prohibitions of R.C. 102.03 (D) and (E).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. See R.C. 1.03; 102.01(G). A public official's or employee's earnings from private employment are within the definition of "anything of value." See Advisory opinions No. 81-007, 84-012, 85-013, and 85-014. The earnings you would receive from your consultation with, and training of, private employers would be a thing of value for purposes of R.C. 102.03 (D) and (E). See Advisory opinions No. 84-009, 88-002, and 90-009.

The Ethics Commission has considered R.C. 102.03 (D) and (E) in numerous outside employment issues and has established parameters for situations where public officials and employees hold private employment in addition to their public service. Generally, the Ethics Commission has held that the Ohio Ethics Law does not prohibit public officials and employees from engaging in outside private business activity so long as no conflict of interest exists between the officials or employee's public and private positions. See Advisory opinions No. 84-012, 85-006, 86-007, 86-008, 87-006, and 90-002. If, however, a public official's or employee's private business interests are of such a character as to manifest a substantial and improper influence upon him, then the Ethics Law prohibits the official or employee from engaging in the private business. See, e.g., Advisory Opinions No. 92-008 (a township clerk is prohibited from

holding employment with a bank which is a depository of township funds) and 92-009 (the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop). See also Advisory Opinions No. 84-009, 85-006, 88-002, and 89-015.

The Ethics Commission has stated that R.C. 102.03 (E) prohibits a public official or employee from accepting or soliciting outside employment from any party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency which he serves, unless the official or employee has not used his authority or influence to secure the outside employment (see R.C. 102.03 (D)) and the official or employee either performs no duties affecting the party or is capable of withdrawing, without interference with his public position, from exercising his official authority in matters affecting the party. See Advisory Opinions No. 79-002, 79-006, 89-006, and 90-009. A public official or employee is also prohibited, by R.C. 102.03, from accepting, soliciting, or using the authority or influence of his public position to secure outside employment where the outside employment could otherwise impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Advisory opinions No. 88-002, 89-006, and 90-009.

The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official from receiving compensation from a private source for services rendered on projects that he has recommended in his official position. see Advisory opinions No. 84-012, 84-013, and 85-013. A public official or employee who advocates that his public agency proceed with a project is prohibited by R.C. 102.03 from receiving future compensation, employment, consulting fees, or anything else of value on the same project. *id.* Furthermore, R.C. 102.03 (D) and (E) prohibit a public official or employee from participating in a matter upon which his private interests are dependent or contingent. See Advisory opinions No. 76-005, 79-003, and 88-005.

The Ohio Ethics Law also prohibits a public official or employee from receiving remuneration for performing, in his private enterprise, the same duties or functions he is or may be required to perform in his public capacity. See, e.g., Advisory opinion No. 81-007 (an employee of a county recorder's office is prohibited from performing title searches for private compensation, since it is his duty to perform those services in his public capacity) . See also R.C. 2921.43 (a public servant is prohibited from receiving compensation, other than as allowed by law, for the performance of his official duties); Advisory Opinions No. 89-014 and 92-015.

You have asked if you may provide training or consultation services, regarding occupational safety and health, and ergonomics, to employers inside and outside the State. You have stated that you have "twenty years of experience" upon which to draw in performing this training. You have explained that, from 1983 to October 1990, you were a technical and science advisor for the Division of Safety and Hygiene at the Bureau, and your position "essentially involved the creation and oversight of the ergonomics program." The ergonomics program gives ergonomics consultation assistance to companies who request such assistance. The employers can ask question about, for example, the ergonomic arrangement of a work place in order to prevent frequently occurring injuries. Employees of the Bureau's ergonomics program will go to the work place and make recommendations to the employer. The recommendations are not binding on the employer, and the employer is not charged for the Bureau's assistance. In your position as technical and science advisor with the Bureau's Division of Safety and Hygiene,

therefore, you were significantly involved in the creation and management of the Bureau's ergonomics program. You have further explained that, from October 1, 1990 to April 5, 1991, you were the Superintendent of the Division of Safety and Hygiene. This division is responsible for aiding the reduction of injuries and illnesses in work places. The division employees visit employers and make suggestions to the employers to reduce illnesses and injuries in the work place. The division also provides training courses at a training center and maintains a resource center for the use of employers.

Therefore, eight years of your service to the Bureau have involved either ergonomics or safety in the work place. As you have explained it, you were responsible for the creation of the ergonomics program in the Division of Safety and Hygiene, and you had oversight of the program for seven years. You were then promoted to the position of Superintendent of the Division of Safety and Hygiene, which you held for six months. You are now the manager of Installations, Acquisitions, and Evaluations for the Bureau, a position that does not involve safety and hygiene or ergonomics.

As discussed above, the Commission has held, in a variety of factual circumstances, that R.C. 102.03 (D) and (E) prohibit a public official or employee from holding outside employment in situations where the private employment presents a conflict with his public employment. In your situation, you have proposed to provide training that is similar to the consultation that you provided as a Bureau employee until April, 1991, and that the Bureau still provides. The consultation and training program in ergonomics offered by the Bureau was created under your supervision. For part of your tenure with the Bureau, you had the authority and influence to establish and administer the ergonomics program in the Division of Safety and Hygiene and then to administer the entire safety and hygiene division. You thus had the opportunity to establish or administer these programs in such a way as to create a niche of future opportunities for yourself. The Ethics Commission has stated, in previous opinions, that a public official or employee is prohibited from using his public position in such a way as to create private business opportunities for himself. See Advisory Opinions No. 84-012, 84-013, and 85-013. For example, in Advisory Opinion No. 84-012, the Ethics Commission stated that a service forester for the Ohio Department of Natural Resources, who provided technical assistance and advice to the general public and to private woodland owners in his public position, was prohibited by R.C. 102.03 (D) from performing services in his private capacity that he had recommended in his public capacity. See also Advisory Opinions No. 84-013 and 85-013.

Additionally, all of the potential in-state customers for your proposed private enterprise are entities that are regulated by the Bureau you serve. See R.C. 4123.01 (B) (defines "employers" for purposes of Chapter 4123., as including the state and all political subdivisions, and all persons, firms, and private corporations that have one or more workmen under any contract of hire, or are bound by any contract of hire to pay the premiums provided by Chapter 4123. into the insurance fund. All identified employers are "subject to Chapter 4123. of the Revised Code") . A pool of potential customers for your proposed private enterprise, i.e., employers in the State, is the same pool of entities that can utilize the ergonomics and safety consultation available through the Bureau. The Bureau provides consultation services on ergonomics and safety and hygiene upon request, and it does not charge for the services. Although you have explained that the consultation and training you would provide is more in-

depth and comprehensive than the training and consultation provided by the Bureau, your private consultation business would, in effect, provide the same general services. The Bureau and your private consultation and training service would provide the same type of services to the same class of entities. It is possible that the companies that would engage your services could misconstrue your role as a consultant. Because of your employment with the Bureau of Workers' Compensation, company officials may feel that they are contracting for the authority or expertise of the Bureau itself, or are hiring a consultant or trainer who has been endorsed or sanctioned by the Bureau. The companies may also feel, if they are solicited by a private trainer or consultant, that the same services are not available from the Bureau, or be unaware that the services are available from the Bureau at no cost.

Applying the general outside employment standard set forth above that R.C. 102.03(D) and (E) prohibit a public official or employee from holding outside employment where the private employment constitutes a conflict with his public employment, it is the conclusion of the Ethics Commission that a public official or employee is prohibited, by R.C. 102.03 (D) and (E), from receiving private compensation to perform duties in his private capacity where the duties are substantially similar to duties performed by his public employer and where the public official or employee established or administered the program through which the public agency performs the services.

You are, therefore, prohibited from receiving private payment for providing services that are available as part of a program established and administered by you as an employee of the Bureau where the Bureau is still providing those services. The overlap between the training and consultation you propose to provide privately, and the training and consultation provided by the Bureau through programs you created and/or administered is so great that it could manifest a substantial and improper influence upon you with respect to your state service if you provided those same types of training services, for private compensation, to employers located in the State. The individuals who would be your clients in the proposed consultation and training could potentially misinterpret your role, and assume that the training or consultation you are providing bears the imprimatur of the Bureau, and will aid the employer in future Bureau actions. The training you propose to provide is inextricably bound, through the potential clients involved, the industrial work place setting, and the safety and ergonomics content, to the function of the Bureau that employs you.

The Commission's conclusion is further supported by the Bureau's own Code of Ethics found in Ohio Administrative Code Chapter 4123-15. Ohio Administrative Rule No. 4123-15-03 (C) provides as follows:

(C) Conflict of interest.

No employee of these agencies shall engage in outside employment that results in a conflict or apparent conflict with the employee's official duties and responsibilities.

(1) Outside employment or activity in which an employee with or without pay represents a claimant or employer in any matter before the industrial commission, a regional board of review or the bureau of workers' compensation is prohibited.

(2) Outside employment with an attorney, representative or entity that involves work concerning industrial claims, whether filed or to be filed, or which is in any way related to workers' compensation matters is prohibited.

Ohio Administrative Rule No. 4123-15-03 (G) provides:

(G) It is understood that standards of ethical conduct may involve a myriad of situations. The good conscience of individual employees shall remain the best guarantee of the moral quality of their activities. The overall intent of this code of ethics is that employees avoid any action, whether or not prohibited by the preceding provisions, which result in, or create the appearance of:

- (1) Using public office for private gain, or
- (2) Giving preferential treatment to any person, entity, or group.

These Administrative Rules suggest that the Bureau considers outside employment of certain types to result in conflicts of interest of such gravity that Bureau employees are simply prohibited from pursuing the outside employment. The Bureau Rules suggest that the Bureau considers certain types of employment, including employment that "involves work . . . which is in any way related to workers' compensation matters," to be improper and thus prohibited by the Administrative Rules. While the application and interpretation of these and other Administrative Rules to your particular question is not within the jurisdiction of the Ohio Ethics Commission, they do suggest support for the Commission's conclusion that the nexus between the function of a public employer and certain businesses its employees may wish to pursue, especially where the employee created the program through which the employer performs the functions, is so great that conflict of interest is inevitable. See Advisory Opinion No. 84-012. Cf. Advisory opinion No. 92-009.

You have also asked if you may provide the training and consultation services you propose to companies located outside the State. These companies are not within the group of employers that may participate in the training provided by the Bureau of Workers' Compensation. Since there is no overlap between the services you wish to provide to employers outside the State, and services provided by the Bureau to these employers, you are not prohibited, by R.C. 102.03 (D) and (E), from providing training and consultation services to those companies. See Advisory opinion No. 84-012 (a service forester of the Ohio Department of Natural Resources may operate his private tree service business outside his district). But see Ohio Administrative Code Chapter 4123-15. However, you are cautioned, as mentioned above, that you must withdraw, as a Bureau employee, from participating in any matters affecting any company which engages you to provide training or consultation services.

Finally, in every situation, you are subject to Division (B) of Section 102.03 of the Revised Code, which provides as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official

duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03 (B) prohibits you from using or disclosing without proper authorization any confidential information acquired by you in the course of your official duties as an employee of the Bureau. You are prohibited from using confidential information to position yourself advantageously in any private business endeavor or for the benefit of any corporation for which you provide private services. See generally Advisory Opinion No. 90-012. You are also prohibited from sharing or disclosing any confidential Bureau information to any party, including a party to whom you provide private training or consultation services. It is important to note that no time limit exists for this prohibition and it is effective while you are serving with the Bureau and after leaving public employment. See Advisory opinion No. 88-009.

Once again, you should note Ohio Administrative Code Chapter 4123-15. You may be subject to Bureau of Workers' Compensation Administrative Rules with regard to the services you propose to provide. See generally Advisory Opinion No. 84-012. The application and interpretation of state Administrative Rules is not within the jurisdiction of the Ethics Commission. Any questions you have involving these Administrative Rules should be directed to the legal advisor for the Bureau of Workers' Compensation.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from providing training or consultation services in his private capacity, where a similar training and consultation program, that was created and administered by the official or employee in the course of his public service, is offered free of charge by the governmental agency the official or employee continues to serve, regardless of the fact that the official or employee no longer administers the program.


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